recorded." Pet. p. 11. Such a finding simply does not exist on the pages cited by the Hospital or, to the best of MNA's knowledge, elsewhere in the arbitrator's opinion.

11. The Hospital states that the arbitrator found that the grievant "used a 'drip' discontinued by the physician to deliver a controlled substance to a patient, i.e., in the opposite of the manner prescribed by the physician." Pet. p. 11.

12. The Hospital states that the arbitrator "further ignores the fact the nurse failed on several occasions to document and have witnessed (by signature) the waste of narcotics or controlled substances where more was withdrawn than necessary." Pet. pp. 11-12. Nowhere in her opinion and award does the arbitrator make a finding that the grievant did this. At best, the Hospital alleges that the arbitrator made an error of fact. Such errors are not reviewable.

13. The Hospital states that although the arbitrator found that it had not proven drug diversion, "that is not what the grievant was charged with." Pet. p. 12. *See also* Pet. p. 19 ("The Court of Appeals mis-stated the actual issued [sic] . . . While it may be that the arbitrator did not make a finding of intentional *drug diversion*, that was not specifically what the grievant had been fired for.") (emphasis in original). As discussed above, the arbitrator specifically found that the grievant was terminated for alleged drug diversion. Pet. App. D. p. 44a.

14. The Hospital states that "the Court of Appeals agreed that the grievant's conduct violated Massachusetts nursing regulations." Pet. p. 8. *See also* Pet. p. 15 ("The Court of Appeals agreed that the nurse had violated the law."). This is a wild overstatement. The Court of Appeals stated only that "Dufault's conduct seems to have violated the Massachusetts nursing regulations." Pet. App. A. p. 12a. Moreover, the arbitrator made no such specific finding, and the Court of Appeals pointed out that the Hospital "cannot relitigate the facts as found by the arbitrator." Pet. App. A. 13a. The Court of Appeals also noted that "[d]uring the pendency of this appeal, the Massachusetts Board of Registration in Nursing dismissed the Hospital's complaint against Dufault for insufficient evidence." Pet. App. A. p. 14a n.3.

15. The Hospital states that "the arbitrator forces the hospital to return to work a registered nurse who she finds has violated numerous specific regulations regarding the use and documentation of controlled substances." Pet. 15. As discussed above, the arbitrator made no such finding.

REASONS FOR DENYING THE PETITION

The decision from which the petitioner appeals neither conflicts with the decision of another United States court of appeals on the same important matter; nor decides an important federal question in a way that conflicts with a decision by a state court of last resort; nor so far departs from the accepted and usual course of judicial

proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Nor has the Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court. At each level, the courts below applied the proper legal standard to review of a binding arbitration award, and reached the proper result that the award was not contrary to public policy. Accepting a petition such as this one would be contrary to the federal policy in favor of final and binding arbitration.

I. The Lower Court Decisions Do Not Meet The Standard For Review By This Court.

The petition meets none of the standards set forth in Rule 10 for grant of a writ of certiorari. The Hospital appears to rely on Rule 10(c), arguing that

> This case presents an important question under federal law that has not been, but should be, settled by this court: whether the federal courts under 29 USC §301 should affirm an arbitration award which effectively nullifies state regulations of nursing practice and state regulation of the use and administration of controlled substances, by preventing an employer from reasonable enforcement of the standards established by law.

Pet. p. 7. MNA notes that the Hospital has not alleged a split in the courts of appeals, or a conflict between the Court of Appeals and a state court of last resort, or an extraordinary departure from the accepted and usual course of judicial proceedings. *Cf.* Rule 10(a). The question

posited by the Hospital is not appropriate for review by this Court because it is unrelated to the proceedings below.

The arbitration award affirmed by the federal courts below does not effectively nullify state regulations of nursing practice and state regulation of the use and administration of controlled substances, by preventing an employer from reasonable enforcement of the standards established by law, or in any other way. As the Court of Appeals below found, the Hospital has here stuffed a straw man. Pet. App. A. pp. 11a-12a. The Hospital failed to prove that the termination of the grievant was for just cause, and the arbitration award reflects this. *See* Pet. App. D. 52a ("The Hospital failed to carry its burden of proof in this matter."). Neither the arbitrator nor any of the federal judges that have reviewed the award wrote a word intimating that the Hospital lacked authority to discipline its employees for just cause, whether that cause was based on regulations of the practice of nursing, on regulations of controlled substances, or on something else. The Hospital retains this authority under the collective bargaining agreement. The only limitation on this authority is the traditional requirement that the Hospital prove its case.

Because neither the arbitrator's award nor the decisions of the lower courts say or mean what the Hospital contends they do, no important issue of federal law not yet reached by this Court is presented. The petition should be dismissed.

II. The Lower Courts Applied The Correct Standard And Reached The Correct Result.

Here, the Court is faced with a grievant whose only lapses in a long and distinguished nursing career relate to minor and infrequent documentation errors, and whose reinstatement is nonetheless attacked as contrary to public policy. The absurdity of the employer's position is self-evident; if carried out to its logical conclusion, it would prohibit employment in the nursing profession of anyone who ever made an error of any magnitude. The reviewing courts below, including the Court of Appeals, made no error either in the selection or application of the legal standard.

The leading case in enforcement of labor arbitration awards is *Eastern Associated Coal Corp. v. United Mine Workers of Amer.*, 531 U.S. 57 (2000) (hereinafter, "*Eastern Associated*"). In that case, this Court reiterated that because the parties to a collective bargaining agreement "have bargained for the arbitrator's construction of their agreement," an arbitrator's award is entitled to great deference by the courts. *Eastern Associated* at 62.

A violation of public policy continues to be one of the limited circumstances in which a court may refuse to enforce an arbitration award. *Id.* In *Eastern Associated*, as in the instant case, "both employer and union have granted to the arbitrator the authority to interpret the meaning of their contracts language, including such words as 'just cause.'" *Id.*

> Hence, we must treat the arbitrator's award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words "just cause." For present purposes,

> the award is not distinguishable from the contractual agreement.

Id. (citation omitted). The question before the Court, then, was whether the parties' effective agreement to reinstate the grievant was unenforceable as contrary to public policy. Such a public policy must be "explicit," "well-defined," and "dominant," and derived from "laws and legal precedents" rather than "from general considerations of supposed public interests." *Id.* (citation and internal quotations omitted). Although the grievant in *Eastern Associated* – who held a "safety-sensitive position" – had twice tested positive for drug use, the Court held that it was not against public policy for the Arbitrator to order his reinstatement. *Id.* at 63-67.

There is no question that, as the Court of Appeals for the First Circuit has found, "Massachusetts law reflects a concern for nursing competence and patient safety." *Boston Medical Center v. Service Employees Int'l Union Local 285*, 260 F.3d 16, 23 (1st Cir. 2001) (finding arbitration award reinstating a nurse whose clinical misjudgments led to the death of a patient not contrary to public policy) (hereinafter, "*BMC*"). There is, however, no clearly-defined public policy against employment of nurses who, like the grievant, make occasional and non-critical errors in their practice. Rather, public policy supports a non-punitive approach to correcting such errors. *Compare BMC* at 25 ("The deficiencies in the grievant's standard of care appear to be . . . amenable to correction through supplemental education and training.") (quotation from arbitrator's award).

In an effort to generate a clear public policy against the employment of the grievant, the Hospital cites to

certain Massachusetts regulations relating to the practice of nursing. *See* Pet. p. 9-10. These regulations are enforced by the Board of Registration in Nursing within the Commonwealth's Division of Professional Licensure. The regulations cited by the Hospital do not explicitly forbid the employment of someone in the grievant's situation. The Board has not to date seen fit to revoke, suspend, or place any limitations on the license held by the grievant. In fact, during the pendency of the appeal to the Court of Appeals, the Board dismissed the complaint filed against grievant. Pet. App. A. p. 14a n.3. Thus, the enforcement body for the regulations relied upon by the Hospital does not object to the grievant's continued licensure and employment as a registered nurse.

The Hospital cites a recent decision of the Massachusetts Supreme Judicial Court in which an award was actually vacated on public policy grounds. *See* Pet. 14-15. That case, *City of Boston v. Boston Police Patrolmen's Association*, 443 Mass. 813 (2005) ("*City of Boston*"), concerns a police officer who was found by the arbitrator to have engaged in outrageous misconduct, including making a false arrest, bringing false charges, and then perjuring himself, but whose termination was nevertheless reduced to a one-year suspension without pay. The Massachusetts high court found that this was one of the "rare instances" in which an arbitrator's award should be vacated for violation of a clear and dominant public policy. *City of Boston* at 813-814. Aside from the obvious distinction between perjury by a law enforcement officer and documentation errors by a medical professional, the *City of Boston* case is inapposite because there, the arbitrator found that the employer had proven that the employee had engaged in certain reprehensible behavior. Here, by

contrast, the arbitrator found that the Hospital *had not proven its case*. Pet. App. D. p. 52a ("The Hospital failed to carry its burden of proof in this matter.").

The Hospital appears to presume that the arbitrator was required to impose some discipline on the grievant for whatever technical violations it believed it proved, regardless of the gravity of those violations, regardless of whether those violations were the actual reasons for the termination, regardless of whether such violations were mistaken or purposeful and regardless of all of the surrounding circumstances – in short, *regardless of whether just cause existed for such discipline*. This is the very question that the parties left to the arbitrator, and it is distinct from whether the arbitrator "condoned" the grievant's behavior. The arbitrator's failure to impose discipline was consistent with her finding that no just cause for discipline existed. The Court should make no mistake: the Hospital is asking for the right to ignore the just cause provisions it bargained for, if it can only link an employee's behavior to a regulation somewhere. This approach is inconsistent with *Eastern Associated*, and if adopted, would deal a serious blow to nearly a century of just cause jurisprudence.

Having applied the *Eastern Associated* standard to the facts of this case as determined by the arbitrator, as it did in *BMC*, the Court of Appeals correctly found that there is no explicit and well-defined public policy against employment of a highly accomplished nurse who has made a few non-critical errors. *See* Pet. App. D. pp. 10a-16a. The Hospital's petition is without merit.

III. This Appeal Frustrates The Established Public Policy In Favor Of Final And Binding Arbitration.

The Hospital brings this petition in the face of a strong policy in favor of final and binding arbitration. This Court and others have repeated that it is only in "rare instances" that a court will set aside an arbitration award. *See, e.g., Eastern Associated* at 62. *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dorado Beach Hotel Corp. v. Union de Trabajadores de la Industria Gastronomica, Local 610*, 959 F.2d 2, 3 (1st Cir. 1992). This is because "the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of [arbitral] awards." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (cited in *El Dorado Technical Services, Inc. v. Union General de Trabajadores de Puerto Rico*, 961 F.2d 317, 319 (1st Cir. 1992)).

The Court of Appeals for the Eleventh Circuit recently confronted an example of what it called "the poor loser problem." *B.L. Harbert International, LLC v. Hercules Steel Co.*, ___ F.3d ___ (2006), 2006 U.S. App. LEXIS 5035, slip op. at 3 (February 28, 2006) (11th Cir. No. 05-11153) ("Harbert"). While the *Harbert* decision concerns an appeal under the Federal Arbitration Act (9 U.S.C. §10 et seq.) and not enforcement of a labor arbitration award under 29 U.S.C. §301, the federal policies associated with each are similar. The *Harbert* court had strong words for the party that repeatedly appealed from an arbitration award without good basis to do so:

> In litigating this case without good basis through the district court and now through this Court, Harbert has deprived Hercules and the

> judicial system itself of the principal benefits of arbitration. Instead of costing less, the resolution of this dispute has cost more than it would have had there been no arbitration agreement. Instead of being decided sooner, it has taken longer than it would have to decide the matter without arbitration. Instead of being resolved outside the courts, this dispute has required the time and effort of the district court and this Court.
>
> When a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken. Arbitration's allure is dependent upon the arbitrator being the last decision maker in all but the most unusual cases. The more cases there are, like this one, in which the arbitrator is only the first stop along the way, the less arbitration there will be. If arbitration is to be a meaningful alternative to litigation, the parties must be able to trust that the arbitrator's decision will be honored sooner instead of later.

Harbert (slip op.) at 19.

The words of the Eleventh Circuit apply at least as well to the Hospital's posture here, before the highest court in the land. This matter has been before an arbitrator, a Magistrate Judge, a District court judge, and a panel of the Court of Appeals. Now it is before this Court on a petition for a writ of certiorari. The many distortions of the record below contained in the Hospital's petition belie a good faith belief in its chances for success. The Hospital has frustrated the federal policy in favor of final and binding arbitration, though it has not yet frustrated the grievant's determination to return to work. In order to

defend the salutary role of the arbitration process, the Court should impose sanctions upon the Hospital under its Rule 42 for continuing to litigate without an objectively reasonable hope of success.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, except to consider whether sanctions should be imposed upon the Hospital. MNA respectfully requests that whatever sanctions are available to the Court be applied to the Hospital for its frustration of final and binding arbitration through repeated appeals of this matter.

Respectfully submitted,

ALAN J. MCDONALD
Counsel of Record
MCDONALD, LAMOND & CANZONERI
Cordaville Office Center
153 Cordaville Road, Suite 210
Southborough, MA 01772
(508) 485-6600

Counsel for Respondent

Supreme Court, U.S.
FILED
APR 11 2006
OFFICE OF THE CLERK

No. 05-1080

IN THE

Supreme Court of the United States

THE MERCY HOSPITAL, INC.,

Petitioner,

v.

MASSACHUSETTS NURSES ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

EDWARD J. MCDONOUGH, JR.
Counsel of Record
MAURICE M. CAHILLANE
EGAN, FLANAGAN AND COHEN, P.C.
67 Market Street
P.O. Box 9035
Springfield, MA 01102-9035
(413) 737-0260

Attorneys for Petitioner

200614

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

I. Petitioner Did Not Misstate The Facts And The Writ Should Be Granted 1

TABLE OF CITED AUTHORITIES

Page

(There are no authorities cited
in this Reply Brief)

I. PETITIONER DID NOT MISSTATE THE FACTS AND THE WRIT SHOULD BE GRANTED

Respondents assert that there are "misstatements of fact" in the Petitioner's Brief. This assertion is not based on actual misstatements of fact, but is largely just argument of various points by the Respondents. Petitioner will address each subject by the Respondent's numbers.

1. The discrepancies are not merely "alleged". At Pet. App. D, 36a and 37a, the Arbitrator, in reporting the facts, states that issues surrounding the Grievant initially arose because the records showed a discrepancy between what had been withdrawn from the Omnicell drug dispenser and what had been administered (Pet. App. D, 36a). The Arbitrator immediately goes on to state that the Grievant in this case was questioned "about what seemed like a large amount of Ativan having been withdrawn . . ." (Pet. App. D, 36a-37a). Obviously, the only discrepancy being described here by the Arbitrator is the excess of drugs withdrawn. Excess (or "large amounts") must necessarily mean more than what was prescribed, otherwise how could any amount be described as large or excess? The same is true as to the reference at p. 52a to the administration of an "additional" 18 mg of Ativan (a whopping overdose, if administered). "Additional" to what? Obviously the Arbitrator recognizes and accepts the withdrawal of additional medication over and above the doctor's prescription (Pet. App. D. 52a).

2. Respondents complain that the Arbitrator "did not find there was no explanation from Ms. Dufault." In fact, the Arbitrator went to great lengths to try and excuse this very fact. Almost the entire discussion (Pet. App. D. 38a-40a) is devoted to the Grievant's inability to give an

explanation, which the arbitrator, both here and elsewhere, tries to excuse as the Grievant not having a full medical record in front of her – even though the Grievant never asked for it.

3. Respondents complain that the Petitioner states that the Arbitrator relies on the Grievants own inaccuracies and omissions as a basis for the decision. The Arbitrator did do this at Pet. App. D. 44a-45a and again at Pet. App. D. 50a. Petitioner did not say it was the *only* basis cited. But there is no question but that at 44a-45a and 50a the Arbitrator is stating that it is too much to expect anything other than misstatements of times and dosages ("it would be surprising if she *could* remember *exactly* what she did", Pet. App. D. 50a). At Pet. App. D. 44a, the Arbitrator specifically states that the discrepancies (simply what the case was all about) "could be accounted for as simple inaccuracies and omissions" (Pet. App. D. 44a). Petitioner disagrees with the conclusion, but clearly it was a basis for the decision.

Petitioner does not deny the Arbitrator also cited "procedural grounds", i.e., the hospital's failure to provide the Grievant with complete medical records for all the patients, even though neither the Grievant nor her representative asked for them in order to provide an explanation. The Arbitrator's attempt to bail out the Grievant by asserting the imperative of giving her that which she never even asked for in order to provide an explanation, actually serves to highlight the absence of an explanation in the first place.

4. There is absolutely nothing inaccurate about the Petitioner's assertion that the Grievant's inaccuracies and omissions were one of the transgressions she was accused of. The Arbitrator *twice* specifically finds that the reason for

the termination was "failure to adhere to the standards of narcotic/controlled substance administration – suspected drug diversion (Pet. App. D. 34a, 40a). *That* certainly encompasses inaccuracies and omissions, and the opinion of the Arbitrator is replete with discussion of instances involving inaccuracies and omissions, e.g., at Pet. App. D. 36a (discrepancies in the record); Pet. App. D. 37a (apparent disparities); Pet. App. D. 37a-38a (not signing out removed drugs); Pet. App. D. 40a (two new discrepancies regarding morphine); Pet. App. D. 44a (accepting the Grievant's "inaccuracies and omissions" as just part of a long day).

5. In their fifth accusation, the Respondents take a Petitioner *argument* – that the Arbitrator excused the whole notion of proper documentation as too much to expect – and claim that this is a "misstatement of fact." Respondents are just discussing an argument. It is inaccurate to claim this was a misstatement of *fact*. Nonetheless, there is no question that the Arbitrator poo-pooed the whole idea of proper documentation and proper nursing practice. It is richly reflected in the record at Pet. App. D. 49a-51a, which consists of almost nothing but the Arbitrator excusing deviation from proper practices, including putting the word proper in quotation marks as if the Hospital was fussing over etiquette at a tea party, instead of the subject of caring for critically ill patients with dangerous drugs.

The "corroboration" which the Respondents cite for Pet. App. D. 50a – that accurate documentation couldn't be expected – is a good example of the poor logic of the opinion. From the mere fact that a doctor testified that he sometimes asked nurses how much of a drug had been administered to a patient, the Arbitrator concludes that his "corroborates" the idea that no one was expected to timely document

administration of drugs. This kind of ridiculous leap of logic is part and parcel of the whole opinion.

6. and 7. Here again the Respondents simply take Petitioner's argument and attempt to characterize it as a misstatement of fact. It is not unfair to state that the Arbitrator "mocked" proper practice. If she wasn't, why was proper placed in quotation marks? It is also entirely fair to say that at Pet. App. D. 51a-52a the Arbitrator excused what the Grievant said she'd done as acceptable, on the grounds that it was "possible" and "not lethal." Those were the Arbitrator's exact words.

8. Here Respondents challenge the Petitioner's mere recitation of what the Arbitrator stated in the opinion. It is perfectly obvious from any reading of the opinion at Pet. App. D. 51a-52a, that the Arbitrator accepts as credible Ms. Hutchins' testimony. The Arbitrator does not reject the testimony, but tries to find an excuse for the actions (i.e. "possible" and "not lethal") and then argues that the testimony *supports* the Grievant *because* it was a "technically improper shortcut." Here again the Arbitrator engages in an irrational leap of logic: if this is what the Grievant did, that means others did it, and if others did it, that means even an improper shortcut is ok.

9. Respondents claim a "misstatement of fact" regarding the grievant's misstating times and dosages and then they quote that finding themselves. The arbitrator states that the Grievant testified that she misstated times and/or amounts of dosages (Pet. App. D. 50a). There is no misstatement of any sort.

10. Respondents say there is no finding of a failure to record administration of controlled substances. At Pet. App. D. 49a-51a the Arbitrator discusses the "missing medications" and refers to Patricia Duclos testimony as credible in stating that it was not proper to not record administration of controlled substances in notes as appended to the medical record. Obviously, the Arbitrator is accepting the fact that this occurred (Pet. App. D. 50a).

11. Respondents apparently dispute that the Arbitrator found the Grievant used a "drip" when is had been discontinued. The Arbitrator discussed the subject of the Grievant's use of a drip when a push was ordered by the physician for two pages at Pet. App. D. 51a and 52a. The Arbitrator states at p. 52a that the *Grievant* testified that this is what she did, and the Arbitrator excuses it because it was not "impossible" or "medically lethal" (Pet. App. D. 52a). It would not be possible to conclude that the Arbitrator had done anything but find that this, in fact, had occurred.

12. Respondents claim there is no finding of a failure to waste narcotics. In discussing the subject of "missing medications" and "extra narcotics", the Arbitrator cites as credible the testimony of Patricia Duclos that this was not proper, albeit excusing it as a short cut acceptable for RNs, even though it is a critical means for controlling access to narcotics and is specifically required by state regulation (Pet. App. D. 50a). Obviously, the Arbitrator accepted that this had occurred. There was, in fact, no dispute that there was no record of the Grievant ever recording waste.

13. The Respondents' charge of a "misstatement" in number 13 is really just a rehash of charge number 4, regarding what the Grievant was charged with. The Arbitrator

clearly states at Pet. App. D. 40a that the reason for termination was "Failure to adhere to the standards of narcotic/controlled substance administration - suspected drug diversion."

14. Here the Respondents challenge the Petitioners' statements about the Court of Appeals decision. The decision of course speaks for itself. The Respondents themselves quote the Court of Appeals that "Dufault's conduct seems to have violated the Massachusetts Nursing Regulation" (Pet. App. A, 12A). That is what the opinion says, it is not a misstatement of fact. Notably, there is no substantive argument that the regulations were not, in fact, violated.

15. Here Respondents challenge the statement that the Arbitrator found the Grievant to have violated nursing regulations. It is true that the Arbitrator did not *characterize* the Grievant's actions as violations of the regulations, but she did find that the Grievant committed the transgressions, which are undisputedly violations of the regulations. This is indeed the heart of the case – it is not, as the Respondents and the Court of Appeals call it, a straw man, it is simply the case that the Arbitrator found that proper documentation, accounting, administration and handling of controlled substances is too much to expect from a busy nurse.

The Respondents claim of "misstatements of facts" fails. In reality, the Respondents are using this term to simply argue the merits of the appeal. They are entitled to argue, but claiming misstatements of fact in the Petition and requesting sanctions is itself frivolous.

Simply attempting to characterize the Petition as frivolous because the Petitioner filed it and did not accede to the award is not an argument about the merits of the case. The Arbitrator endorsed violations of important public policies. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD J. MCDONOUGH, JR.
Counsel of Record
MAURICE M. CAHILLANE
EGAN, FLANAGAN AND COHEN, P.C.
67 Market Street
P.O. Box 9035
Springfield, MA 01102-9035
(413) 737-0260

Attorneys for Petitioner